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Hon. Andrew D. White.

With Compliments of

Geo: H: Moore

New York: May 25. 1885.

SUPPLEMENTARY NOTES

ON

WITCHCRAFT IN MASSACHUSETTS:

A Critical Examination

OF

THE ALLEGED LAW OF 1711 FOR REVERSING THE ATTAINDERS OF THE WITCHES OF 1692.

BY

GEORGE H. MOORE, LL.D.,

CORRESPONDING MEMBER OF THE MASSACHUSETTS HISTORICAL SOCIETY.

FROM THE PROCEEDINGS OF THE SOCIETY, MARCH 13, 1884.

CAMBRIDGE:

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WITCHCRAFT IN MASSACHUSETTS.

At a meeting of the Massachusetts Historical Society, held March 13, 1884, the President, the Hon. Robert C. Winthrop, introduced, in fitting terms, Dr. George H. Moore, of New York, who presented the following communication: —

First of all, I desire to acknowledge the characteristic and generous courtesy of my friend, who has challenged in so charming and chivalrous a manner the correctness of some of my statements.[1] One would almost be willing to go astray to be brought back to the right path so kindly. I venture to differ from him with the highest respect. I am sure of his sympathy in the present attempt to explain my position and to throw such additional light upon the chief point at issue between us as the explanation may furnish. I think I shall make it clear that I have not been mistaken in my assignment of error.

In my Notes[2] I pointed out as an error in the current history of witchcraft in Massachusetts the statement that the General Court passed an act reversing "the several convictions, judgments, and attainders against the persons executed, and several

[1] Further Notes on the History of Witchcraft in Massachusetts. With a Heliotype Plate of the Act of 1711, and an Appendix. By Abner Cheney Goodell, Jr. Proceedings of the Massachusetts Historical Society, June, 1883, p. 280.

[2] Notes on the History of Witchcraft in Massachusetts; with Illustrative Documents. By George H. Moore. Proceedings of the American Antiquarian Society, October, 1882, vol. ii. n. s. p. 162.

who were condemned but not executed." I did not neglect to add that "an act of this sort has actually been printed, and has found place and authority among recognized materials of history; but no such act ever became a law." I also referred to a private act of 1703, reversing the attainders of three of the sufferers, and added: "This private act was the only law of the kind which can be found in all the legislation of Massachusetts."

The writers whom I criticised furnished no authority for their statements respecting the law in question which was deemed sufficient by the State Commissioners to warrant them in recognizing it as a completed act of legislation. It is not to be found in their grand collection of all the Province Laws, — that noble and lasting monument of the wise liberality of the Commonwealth, as well as the rare learning and ability of the Editor. From that fact I gained fresh confidence in the results of studies which had led me to deny the existence of any such law before the point was thus so authoritatively settled.

But the present situation is much changed. Since the first volume of the Province Laws was published, Mr. Goodell has made an interesting discovery, which he regards as conclusive in determining the validity of the act in question and establishing its authority as a complete law. I sincerely regret that I am unable to agree with him in this conclusion; but my reasons will appear in what I have to say on the present occasion.

Mr. Goodell has not only met my statements by the confident assertion that such an act was actually passed, but he has produced a document bearing the imprint, "Boston: Printed by B. Green, Printer to His Excellency the Governour and Council, 1713." He has most kindly and promptly furnished me with a fac-simile of it, together with copies of everything at his command to illustrate its history. These, however, do not include any explanation of its long concealment (through more than a century and a half), or whence it has now come to assert its own existence and authority, and to challenge the criticism which is its due. It is hardly necessary for me to say that it was entirely unknown to me, or to explain that it is not the same thing to which I referred in my paper. It was equally unknown, no doubt, to all the writers whose statements I contradicted.

"There can be no averment against a record," is good history as well as good law; but history and law alike require that a record shall be complete. The House of Representatives of Massachusetts, in 1770, gave Lieutenant-Governor Hutchinson one of their carefully stated legal opinions, from which I venture to quote an appropriate passage: —

"*No law can be valid unless it be enacted by the Governor*, Council, and House of Representatives assembled in General Court; and *this must appear* from the Parchment roll wherein the act is recorded, *otherwise the record itself is not complete*, and it becomes necessary to resort to dehors Evidence to prove a fact essential to the validity of the Act, which is against the established rule respecting Records.[1]

The rolls of the acts were in parchment under the Province Seal.[2] It may be difficult to explain to a generation which has almost forgotten the efficacy of any seal, excepting that which certifies the brand of a favorite wine, that awful mystery of authority and sanctity which belonged to seals, from the Great Seal of the Kingdom, or that of the Province, down to the curious little impressions in wax which still sometimes puzzle the heraldic and genealogical studies of local antiquaries. But "the men of Massachusetts" in the eighteenth century had not forgotten the traditions of their fathers; and every detail of due formality in legislation was then as carefully observed as ever was the etiquette of an imperial court or a royal household.

The history of this attempt at legislation may be briefly told. A petition had been prepared to be presented to the General Court in October, 1708, and was presented to the Council in the following year, for an act to "restore ye Reputations to the posterity of the sufferers [in the witchcraft of 1692], and to remunerate" them for their losses in property. Here are two things to be done, which must be kept in

[1] Journal, 1770, p. 134.

[2] This usage apparently did not prevail under the first charter; for in the "Observations upon the Laws of Massachusetts, October, 1692," "It is humbly enquired whether the Act for continuing the local Lawes to stand in force, &c., be not a breach upon the method apointed for the makeing of Lawes either by the old Charter or New settlement *haveing never any of them been ingrossed in parchment or a seale affixed to them and* haveing been *declared voyd* by the King's Councill learned in the law *for want of such method of enacting*," etc. — *Province Laws*, vol. i. p. 109.

mind: 1. Restoration of reputation; 2. Remuneration for losses in property.

The only immediate action was to order a bill for the first of these claims, — restoration in point of character; and accordingly the Bill to reverse the Attainders of several Persons for Witchcraft was read three several times, debated and passed on the same day (June 10, 1709), the names of the persons to be agreed upon by both houses for insertion in the bill subsequently.[1] There is no evidence whatever in this record to justify the inference that there was a general feeling in the Council in favor of pecuniary reparation, — that part of the petition being entirely ignored.

Nothing further was done during that session; but the bill was again read and voted to be revived on the 9th of November in a subsequent session, and sent down to the House of Representatives for concurrence, which it failed to receive.

The next step forward was not taken until after the beginning of another political year, in a new General Court, on June 27, 1710, when a bill of the same tenor, if not the same bill, appeared in the Council, with an order annexed thereto appointing a joint committee to inquire, —

1. What names should be inserted in the bill to reverse the attainders of the sufferers; and

2. What damages they sustained by their prosecution.

Here, for the first time, we find the claim for compensation noticed by the legislature, more than a year after the time when it is alleged that the feeling was general in the Council favorable to such action. Again: although the committee thus appointed performed all the work they ever did on the subject in this second year, no further trace appears of legislative action until the autumn of the third political year. The result of their labors was a report containing, (1) a recommendation of the names of twenty-two persons, out of the thirty-one condemned, to be inserted for the reversing of their attainders; and (2) a statement of the several sums of damages which the committee thought would be readily complied with by the legislature, to be paid to the same persons whose at-

[1] Why any delay was necessary in agreeing upon the names to be inserted, why agreement was suggested, unless there were differences of opinion of a serious nature, can hardly be explained.

tainders they thought should be reversed, the names of Sarah Wardwell and Elizabeth Procter being coupled with those of their husbands respectively in the award. These women had been relieved of their attainder by a previous act of the legislature in 1703, as well as Abigail Falkner. This woman, who was condemned Sept. 17, 1692, reprieved and afterwards pardoned by Governor Phips, was not only awarded damages, but recommended for a third purgation by this committee. Why she needed or received this triple relief from the pains and penalties of her conviction and sentence does not appear.

The remaining victims —

Bridget Bishop, executed June 10th,
Susanna Martin, " July 19th,
Alice Parker, " September 22d,
Ann Pudeater, " " "
Margaret Scot, " " "
Wilmot Read, " " "

and Eliz. Johnson, Jr., condemned Jan. 11th, 1693, but not executed —

were not included in any legislative benefit.

Perhaps the following brief letter from one of the committee to Major Sewall will furnish the clew to an explanation of this fact:[1] —

Mr Sewall. — Sr I thought good to returne to you ye names of severall psons yt were Condemned & Executed that not any person or relations Appeared in ye behalfe of for ye taking of ye Attainder or for other [their?] Expences, they I supposed were returned to ye Genl Courts consideration for to act about according to their best prudence. Bridget Bishop alias Oliver, Susanna Martin, Alice Parker, Ann Pudeter, Welmot Read, Marget Scot.

Sr I am yrs Honors to Serue,

Neh. Jewet.

"The best prudence" of the legislature in leaving out all who were not claimants or represented by claimants of money, etc., may explain their omission or reluctance to make a general act.

Another letter of Nehemiah Jewett to Stephen Sewall, dated 28th November, 1711, furnishes a list of the names of the respective sufferers, and the sums that the petitioners

[1] Records of Salem Witchcraft, vol. ii. p. 249.

prayed for. A comparison of this list with the report to the legislature will show that in every instance (excepting one, and that evidently a clerical or typographical error) the amounts allowed were exactly the same as those prayed for. Why the committee stated in their report that they had heard the several demands, etc., and that upon conference these were moderated, etc., remains to be explained.

This report of the committee, bearing date "Salem, ye 14th Sept^r^, 1710," was read and accepted in the House of Representatives, and sent up for concurrence on the 23d of October, 1711. It was concurred in by the Council on the 26th of October, and appears of record as having been consented to by the Governor. As without his consent or approbation, signified and declared in writing, no law could be of any force, effect, or validity whatever,[1] so this report, being an act made by the House of Representatives and the Council, became valid as a statute by the same consent.[2]

On the 27th of October, 1711, the day after the report of the committee became a law, the bill for reversing the attainders appears again, with the record that it had been passed by the General Assembly at their sessions, 1709,[3] to be engrossed, and a committee had been appointed to consider the names of persons to be inserted, and upon their report now inserted, was again read and passed to be engrossed.

On the 2d of November the General Court Records state that the engrossed Bill to reverse the Attainders of George Burroughs and others for Witchcraft passed in the House of Representatives, was read and concurred to be enacted. So far we have the record, — but no farther. "Here," says Mr. Goodell himself, "we encounter a doubt which cannot be wholly removed without reference to external evidence." There is no record evidence whatever of the consent or appro-

[1] Province Charter.

[2] Barrington on the Statutes, p. 46.

[3] This may have been a clerical error for 1710, as the committee was certainly not appointed in 1709, — no very remarkable error, either, all things considered. Mr. Goodell says "the bill had been kept alive by virtue of a general order passed the last day of the second session of 1711, continuing all unfinished business to the fall session." He does not explain how the bill retained its vitality during the previous year, — from June 27, 1710, till the 7th July, 1711. But its history exhibits an unprecedented series of resuscitations after parliamentary death, of which its present resurrection is perhaps the most marvellous.

bation of the Governor, which was absolutely necessary to give any force, effect, or validity to the enactment. "From the nature of these records, it follows that an entry of final passage is not conclusive evidence of complete enactment."

I have the highest authority for the statement that the Governor's consent was indicated upon the passage of a bill:

> "From 1693 onward the invariable practice was to sign as follows:
>
> 'I consent to the enacting of this Bill.
> RICHARD ROE.'
>
> "This was preceded by the usual memoranda of passage by the two branches. The memorandum of the Governor's consent was sometimes prefaced 'By his Excellency, the Governour,' and this finally became the general practice."

There is, therefore, no probability of setting up any record evidence of Governor Dudley's consent to this act. It must be proved, if it is proved at all, by "dehors evidence."

The difficulty thus encountered is very serious, and we must have some other evidence to supplement the bare presumption that the bill received the Governor's signature, and passed the Province Seal. The original records of acts are said to have been consumed in the great fire of 1747; — the engrossment of this act is not in the Secretary's office; nor is a copy of the bill, or the original draft thereof, to be found among the archives. No mention of any such act has been found in the Public Record Office in London, nor any indication of its existence in the British Museum or in any other known collection, public or private, excepting the well-known manuscript at Salem, and the printed sheet of 1713 (now produced), which also comes from Salem.

The copy at Salem, although it is said to be in a handwriting which those familiar with the Massachusetts archives can identify as that of Addington or one of the nameless clerks who assisted him in the Secretary's office, was not attested, and bore on its face no evidence of having been signed or sealed, and was without the usual memoranda showing the dates of the several stages of its passage and the fact of its publication.

Thus, although it has been considered as an official copy, which was procured by an attorney who had been employed for

the purpose, and by him placed on file among his official papers, it bears only the slightest evidence of authority for the supposition that the bill ever became a law. The inference is unavoidable, that it was inchoate, and at best was indicative of what might have been regarded as due to the petitioners, or what they themselves desired, but which they may have been, either willingly or unwillingly, obliged to relinquish, perhaps in consideration of receiving pecuniary relief.

Sewall's employment to procure "a coppy of the act" bears the date "December, 1711." It was therefore obtained probably at the same time with the warrant on the Treasury, which was dated (Dec. 17, 1711) more than six weeks after its passage, and certainly not less than a month after the end of the session,[1] when, if ever, the enrolment of the law must have been in the Secretary's office. Why is it incomplete? The only explanation possible is that the act had not been completed. The only complete enactment on the subject at that time was the report of the Committee of Award and Distribution, which, as I have said, became itself an act or law by the signature of the Governor.

It will be important to keep this fact distinctly in mind throughout the whole of the argument which is to follow; and I repeat it. The report of the committee which related to both the reversal of attainders and the award of indemnity became a law in October, 1711. The bill for reversing the attainders, which made no reference whatever to any pecuniary benefit, never became a law, although it passed through two branches of the legislature, Nov. 2, 1711.

This latter bill, if recognized and accepted by the Commissioners, must stand alone by itself, without peer or parallel in all the legislation of the Province of Massachusetts. I find not one act in the whole series so nearly without any support, so improbable in itself, or so questionable in shape as it now reaches us.

Mr. Goodell refers to other acts of the same year (1711), about the completion of which he had entertained doubts which were afterwards cleared up. But this act was not among them, and differs entirely in its status. All those

[1] The fifth session of the General Court of 1711–12 ended on the 10th of November, 1711.

referred to are known to have been printed contemporaneously in due course and by regular official authority, — two of them in the supplements to the edition of 1699; one of them a Temporary Act of short continuance, published by proclamation; and a fourth a Tax Act, always in those days printed separately.

The only additional light which has enabled Mr. Goodell to accept and assert the genuineness of the act is the production of a copy purporting to have been printed by the official printer two years after the date of its passage through two branches of the legislature.

In ordinary cases this might be taken as conclusive, carrying on its face presumptive evidence that the necessary approval of the Governor could not have been wanting. Very high notions were in vogue at that time about the dignity of the General Court as well as the Chief Magistrate; and it is difficult to believe that the official printer would dare to print as an act of the legislature anything which in any way fell short of being so.

But, granting the fact claimed for it that it was printed in Green's office, it is possible that the printer's types were used for the purpose clandestinely, with or without his knowledge, that he was imposed upon or acted without proper authority, and that the sheet was either never publicly exposed or that it was promptly suppressed. Most certainly it has never been heard of before, or made any public appearance until now. The survival of such a leaf of legislation from that day to this, in one solitary printed copy, so far from supporting or being supported by the Salem manuscript, bears in itself the same damaging evidence of incompleteness, and provokes the same criticisms. It must be regarded as an imperfect and unsuccessful attempt to satisfy the claim for redress, which had been stumbling and halting through several years of hesitation between justice and expediency, and fell still-born into the hands of the thrifty clerk of the Salem courts, who became attorney for the poor and scattered members and representatives of those families which had been ruined in the diabolical storm of 1692.

The doubt is sufficient in my judgment to warrant the most sceptical criticism of the act itself as it appears in print, and the most careful scrutiny of every item of support that is

claimed for it. It is proper to repeat here that this newly discovered "printed act . . . which is believed to be unique," is the *only new evidence* in the case. The copy which is on the court files at Salem, printed by Mr. Woodward in 1864, was, and is, just as well fortified by the record as this printed copy of 1713, now first produced; and nothing is yet brought to support the genuineness of the latter, which is not equally conclusive in favor of the old manuscript.

Mr. Goodell says, however, that "the record shows that Dudley consented to the report of the committee, . . . and as this report supplied all that was wanting to make the bill, *which had passed the several stages of legislation*, complete," etc., the Secretary in making up his records might have regarded such record of consent as sufficient for the bill as well as the report.

Now the fact is, that the report was accepted in the House of Representatives on the 23d of October, 1711, and the Council concurred on the 26th, when the Governor also consented to it.

The act, however, for reversing the attainders, so far from having already "passed the several stages of legislation," had been slumbering quietly somewhere for a year and a half, and had not even been revived in that General Court before the report had become a law. Then, on the next day, Oct. 27, 1711, its long rest was disturbed, and the act was produced, read, and passed to be engrossed. But although thus hastily revived, it did not pass the stage of legislation necessary to make it "complete and ready for the executive approval" until November 2, one day less than a week after the approval of the report, so that it is not at all likely that the Secretary could have been mistaken or misled, or otherwise failed in his duty in the fashion suggested. The presumption here is in favor of that officer: *Omnia presumuntur rite ac solenniter acta.*

Mr. Goodell goes on to say: "This act having been passed and the required sum appropriated, a warrant, in due form, for drawing the same from the treasury, was issued by the Secretary and signed by the Governor, Dec. 17, 1711."

In this proceeding there was not the slightest reference to "this act," in any stage of it; but on the contrary the warrant itself expressly refers to the report of the committee accepted

by the General Assembly as its foundation and authority. We ask in vain, why was the act thus ignored? Why was it that an act was not drawn embracing all the recommendations of the committee, and furnishing a clear and unmistakable restoration, by the reversal of all the attainders and award of damages by authority of express enactment in the usual form?

Mr. Goodell adduces as further evidence that "the act became a law . . . the declaration to that effect of those who united in appointing Stephen Sewall to collect the compensation awarded to them by the committee, in 1711, and also their request that he procure a copy of the act."

The so-called "declaration to that effect" is that they "are informed" of the passage of "an act in favour of us respecting our Reputations and Estates;" and they authorize and request their attorney (Sewall), who was probably the informer, to procure "a coppy of the said act" and "receive what was allowed." The only act which answers this description is the "report." Neither the act now produced nor the manuscript draft of the act preserved in the Salem court files has any provision or provisions "in favour of" the sufferers or their representatives "respecting their Estates;" and nearly one half of those who signed the power of attorney soon discovered that whatever the action of the legislature had been, it was of no use or benefit to them.

The wretched remnants of these poor families were unquestionably much more deeply interested in their "Estates" than their "Reputations," as affected by the action of the legislature; and the request for the "coppy of the act" was probably a part of the apparatus of the attorney for the increase of *his* compensation, — certainly not of their allowances.

Mr. Goodell further calls attention to two distinct contemporaneous references to this act. Samuel Wardwell addressed a petition to the Committee of Distribution sitting at Salem, Feb. 19, 1712, representing that his mother's name "is not inserted in the late Act of the Generall Court, for the taking off the Attainder," etc. He adds: "My mother being since deceased, I thought it my duty to endeavour that her name may have the benefit of that Act. I therefore humbly pray your Honours to Represent this case to the Honourable Gen^{ll} Court, that my mother's name may be inserted in the

said Act."[1] He also desires further remuneration for losses and expenses by reason of the proceedings against his father and mother.[2]

Elizabeth Johnson, Jr., also presented a petition to the same committee, in which there are allusions to an "Act lately made by the General Court for taking off the Attainder," in which her name was not inserted. "Being very desirous of the favour of that Act," she also prayed the committee to represent her case to the General Court at their next session, that her name might be inserted in the act, and also that the Honorable Court would make her some allowance, etc.

Both these petitions have the same date of Feb. 19, 1712, — the date of meeting of the Committee of Distribution at Salem, at which, and perhaps by which, they appear to have been suggested; and both refer to an act, as though incomplete, to which they desired additions. Their advisers, Sewall their attorney and the minister of Andover, in whose handwriting both petitions are said to be, certainly could not have suggested such modifications of, or additions to, a statute which was already a law of the land. Although their clients may have been as stupid and worthless as Calef and Hutchinson (probably following Calef) represent them,[3] neither Sewall nor the Andover minister was likely to blunder in that fashion.

And these are all the references which I can hear of or discover made by contemporaries or anybody else until the recent historians adopted the Salem manuscript as a genuine law of the Province, and followed each other blindly without any apparent critical examination whatever. They are all that have been produced or can be found, so far, as contemporaneous testimony to support the allegation that the bill became a law. They are also the only notices of any such legislation which have been found in all the history and materials of

[1] It is somewhat remarkable that this man was ignorant of the fact that his mother's name had received the benefit of the previous act of 1703.

[2] Records of Salem Witchcraft, vol. ii. pp. 241–421.

[3] Calef says of Mary Post and Elizabeth Johnson, Jr., that they were ("as appears by their behaviour) the most senseless and ignorant creatures that could be found." (p. 141.) Wardwell, the other petitioner, does not seem to have been any wiser. Hutchinson (vol. ii. p. 60) speaks of Post, Johnson, Jr., and Wardwell as "three of the worst characters," etc.

history of Massachusetts from that day forward for more than a century.

Now these references, so far from establishing the completeness of the law, prove the contrary, and sustain the view which I have taken,—that it was unsatisfactory and incomplete. It may have been arrested at the stage in which the record leaves it, expressly because it was seen and known to be imperfect, — one third of the sufferers not mentioned at all, some restored a second time, names omitted, etc. In this view alone these petitions of Wardwell and Johnson become intelligible, — that as for several years before the matter had been taken up and then "allowed to subside," in alternate fits of progress and delay, there was still an opportunity for inserting names in a future revision before the bill should become a law; and when the subject might be again before the legislature, it was hoped that further provision would be made in the way of remuneration.

In style and method, and literary treatment altogether, this act is without any parallel which I am able to recall in the legislation of Massachusetts or any other government. It is slovenly and inaccurate. Two places are left blank where the name of the wife of poor Giles Corey should appear twice, although it is correctly given in the same report of the committee from which the list is said to have been copied into the act, so that the negligence with which Mr. Goodell taxes the Committee of Award and Distribution — with justice, no doubt — must also be charged upon the authors of this bill in the legislature. It would be easy to multiply doubts suggested by its imperfections. These are such as greatly impair its substance and value as compared with its originally avowed purpose. It is imperfect, it is insufficient, notwithstanding its prolonged delays in preparation and postponements of action; in short, it is just such a bill as I should not expect Joseph Dudley to approve or consent to, — not only a Governor, but a Chief Justice who had experienced a review of his own doings in New York when Jacob Leisler's attainder was reversed by an act of Parliament (the only authority competent to pass such a law), — an act which has some features in common with that under discussion, — the historical preamble being untrue, and the reversal of the attainder of no value except as a motive and makeweight towards a

liberal indemnity to be sought from a subsequent New York legislature.

I have alluded to the Parliament of Great Britain as the only authority in all the British Dominions competent to pass a law reversing an attainder. This was not only the fact, but the mode of procedure always required that the royal assent should be previously obtained.[1] The exceptional character of bills for restitution of honors and blood has always been notable in parliamentary law. They are to this day first signed by the Queen, and are presented by a lord to the House of Peers by command of the crown, after which they pass through the ordinary stages and are sent to the Commons. Here the Queen's consent must be signified before the first reading; and if this form be overlooked all the proceedings will be null and void. After the second reading, the bill is committed to several members specially nominated, with "all the members of the House who are of her Majesty's most honorable privy council, and all the gentlemen of the long robe." Such bills receive the royal assent in the usual form, as public bills.[2] The "laws of England" in the tenth year of the reign of Queen Anne were certainly no less stringent than in these later years of Queen Victoria; and I think it would have puzzled the authorities of Massachusetts in 1711 to conceal, explain, or justify the manifest "repugnancy" of such an act as the one in question to English laws and English ways of making and administering them.

In the forms of procedure the doings of the Great and General Court were largely modelled upon those of the imperial legislature; and curious parallels may be discerned between the grand councils of the realm, organized and conducted at Westminster with all the pomp and ceremony befitting the representation of an ancient monarchy, and those of their humbler imitators on the edge of the Western Continent, between the forests and the sea.

Half a century later than the period to which our discussion refers, with the Sugar Act, the Stamp Act, and the Boston Port Bill almost in view before them, the Massachusetts

[1] Hatsell's Precedents, vol. iii. p. 337. "The purport of some bills must necessarily be communicated to the king, even before they are presented; as bills for the reversal of attainders," etc.

[2] May's Law of Parliament, 8th ed., pp. 832, 833, and authorities cited.

House of Representatives declared: "We shall at all Times think it our highest Honor and Happiness to make the Proceedings of the British Parliament our Example." [1]

I am not aware that any attempts were made by other colonies or provinces of Great Britain to pass acts to reverse attainders, — a proceeding which involved so direct an invasion of the prerogatives of king and Parliament [2] that even Massachusetts might have hesitated. It is measurably certain that neither the act of 1703 nor this alleged act of 1711 ever came under the notice of the Privy Council; for any knowledge of either of them would surely have commanded the attention of the crown lawyers, and elicited prompt and emphatic disapproval.[3]

Of course the fact that the General Court of Massachusetts had no right to pass such an act is no evidence that they refrained from the attempt; but Dudley must have known what were the methods and precedents of the law of England and practice of Parliament; and although he signed the act of 1703, he had an opportunity to be reminded of his duty as a servant of the crown between that year and 1711. I have already alluded to his connection with the judicial murders of Leisler and Milborne at New York in 1691. The attainder of Leisler was reversed, with all these customary formalities closely and minutely observed, in 1695. Dudley himself was at that time in London, and one of the witnesses in the examinations by the Parliamentary Committee.

When under a new governor in New York the Leisler

[1] Journal: 1762–63, p. 144.

[2] "Not even the king's pardon can restore or purify the blood; nothing but the high and transcendent power of Parliament." — *Blackstone*, bk. iv. cap. 31.

[3] An instance of the assertion of the royal prerogative in Massachusetts occurred in 1725 upon occasion of an attempt to promote a synod or assembly of the clergy. It was regarded as certain, in point of law, that the royal supremacy in ecclesiastical affairs, being a branch of the prerogative, took place in the Province, and that synods could not be held, nor was it lawful for the clergy to assemble as in a synod, without the royal license. The application, therefore, to the General Court which was then made was declared by the crown lawyers to be a contempt of his Majesty's prerogative, and the Lieutenant-Governor was rebuked for his failure to withstand and reject it instead of subscribing his consent as he had done. He was further directed to signify to those who had been active in the design that such an assembly was against law, and they should forbear to meet, on penalty of prosecution, by information, for a misdemeanor. The synod was not held. Chalmers's Opinions, vol. i. p. 12. Cf. Hutchinson, vol. ii. pp. 322, 323.

party gained the ascendancy, they signalized their revenge by turning the tables on their opponents, and new state trials resulted in the condemnation of Colonel Nicholas Bayard and Alderman John Hutchins to the same punishment which had been inflicted on Leisler and Milborne. They escaped the penalties, however, to which they had been exposed; and in 1703 the legislature of the Colony dealt with the case in a fashion which might well have furnished instruction to Dudley. So far from attempting to reverse attainders by the act of a colonial legislature, they passed an act declaring the illegality of the proceedings against Bayard and Hutchins, and did not even presume to do that without the permission of the crown duly signified, as it is recited in the act, viz. :—

"Which matters having been fully heard and Examined before Her Most Sacred Majesty in Council at the Court at St. *James's* the 24th Day of January, 1702, upon Consideration thereof, Her Majesty being sensible of the Undue and Illegal Proceedings against the said *Bayard* and *Hutchins*, was then most graciously pleased in Her Royal Justice and Bounty, to order that her Attorney General here should be directed to consent to the Reversing those Sentences, and to whatever else may be requisite in the Law for the Re-instating the said Bayard and Hutchins in their Honour and Property, as if no such Prosecution had been."[1]

Let us consider further the construction and contents of the bill in question. It affirms as a fact that in 1692 "several towns within this Province were infested with a horrible Witchcraft or Possession of Devils," and makes a very emphatic and significant record of the reason why after a time a stop was put to the prosecutions, in the statement of a great dissatisfaction when they reached "Persons of known and good reputation." They then thought it necessary to appeal to their Majesties the King and Queen. Their victims had no chance to appeal, and their only ground of appeal was from the probable consequences of their own madness and folly. The result of that representation is stated to have been a letter from Queen Mary the Second, bearing date the 15th of April, 1693, the terms of which as given might with justice be regarded as a supplement to the famous "Advice of the

[1] Act of 19th June, 1703, MS.

Ministers"[1] while the delusion was raging, and would have been of precious little value to those who were accused if the storm of this tyranny and wickedness had not already been long overpast.

The preamblers go on to say, as the last of their incoherent and rambling apology, that "some of the Principal Accusers and Witnesses in those dark and severe Prosecutions have since discovered themselves to be Persons of Profligate and Vicious Conversation." The fact that they were so was perfectly well known from the beginning. They were the "vile varlets" of whom Robert Calef pungently reminded the champions of the witchcraft delusion when he so courageously encountered the wrathful indignation and unparalleled abuse of the great protagonist of that fearful drama, — Cotton Mather.[2]

In accordance with the report of the committee, as I have already stated it, the enactment provided for the reversal of the attainders against twenty-two of the sufferers, omitting nine of them, of whom two had been relieved by the act of 1703, so that seven still remained attaint, apparently, though of course not in fact, liable to the pains and penalties to which they had been condemned. One who had been relieved by the act of 1703 was also included in this act. As all the survivors had been pardoned by the Governor, the statement in the act that they were "lying still under the like Sentence of the said

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[2] Calef, Preface, p. vi.

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Court and liable to have the same Executed upon them" was simply false.

By far the most important provision of the whole act, and in fact the only one which would have been of any substantial value to anybody, was the concluding paragraph, by which all the officials of every grade who had been concerned in these outrages got their *quietus* and protection against "prosecution in the law."

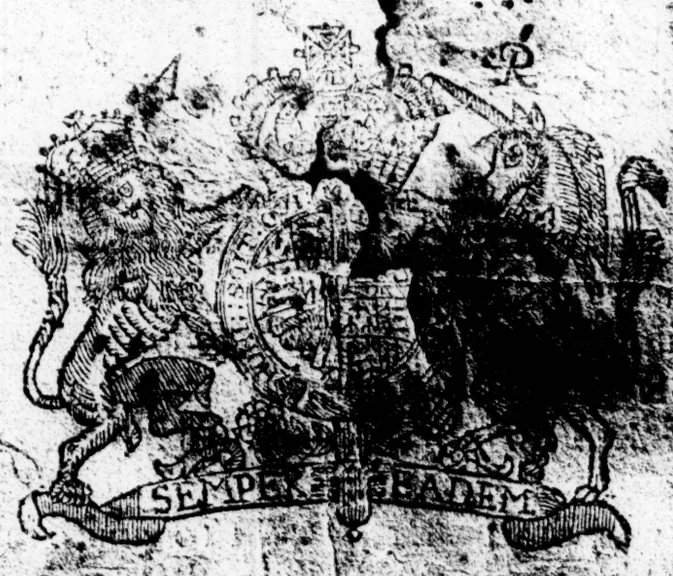
We come now to the document itself, — the actual printed paper.[1] It is a single leaf, and to the practised eye, familiar with the fashion of printing the laws in those days, it presents every external aspect of genuineness. Indeed, I find it difficult to doubt that it was printed with the types of Bartholomew Green, and ornamented at the head with his new cut of the Royal Arms, which replaced its old, worn-out predecessor in that very year (1713).

But the black-letter type on the left — the next thing which strikes the eye — presents an uncommon appearance, both in the words and in the arrangement. It would be difficult to show anything like it in any other page-heading among all the laws in print. It was not customary to use those words, "Province of the Massachusetts Bay," before the general title, caption, or session heading which always preceded the titles of the several acts, whether one or more. The use of the black letter in the words "New England," "Boston," and "October" is also unusual. They were always in italics in the regular issues from that press. The date, too, of the day of meeting is given in Arabic numerals, which in the regular issues was always printed out in full Roman letters, e.g. "seventeenth," not "17th."

And here we reach the point of demonstration which not only justifies the suspicions already hinted at, but proves conclusively that this paper was printed not only for a purpose apart from the usual order and method of printing the laws, but also under the direction of some one not familiar with the routine of the office and ignorant of the details of the authorized official work of that press. The caption, which sets forth the authority of what is to follow, reads thus: —

[1] See the accompanying fac-simile of the "Act of 1711," which the great kindness of Mr. Goodell enables me to present with this paper.

Regni ANNÆ Reginæ Decimo.



Province of the
Massachusetts-Bay.

AN ACT.

Made and Passed by the Great and General Court or Assembly of Her Majesty's Province of the Massachusetts-Bay in New-England, Held at Boston the 17th Day of October, 1711.

Read 2 times

An Act to Reverse the Attainders of George Burroughs and others for Witchcraft.

FOR AS MUCH As in the Year of our Lord One Thousand Six Hundred Ninety Two, Several Towns within this Province were Infested with a horrible Witchcraft or Possession of Devils; And at a Special Court of Oyer and Terminer holden at Salem, in the County of Essex in the same Year One Thousand Six Hundred Ninety Two, George Burroughs of Wells, John Procter, George Jacob, John Willard, Giles Core, and his Wife, Rebecca Nurse, and Sarah Good, all of Salem aforesaid; Elizabeth How of Ipswich, Mary Eastey, Sarah Wild and Abigail Hobbs all of Topsfield: Samuel Wardell, Mary Parker, Martha Carrier, Abigail Falkner, Anne Foster, Rebecca Eames, Mary Post, and Mary Lacey, all of Andover: Mary Bradbury of Salisbury: and Dorcas Hoar of Beverly; Were severally Indicted, Convicted and Attained of Witchcraft, and some of them put to Death, Others lying still under the like Sentence of the said Court, and liable to have the same Executed upon them.

The Influence and Energy of the Evil Spirits ſo great at that time acting in and upon thoſe who were the Principal Accuſers and Witneſſes, proceeding ſo far as to cauſe a Proſecution to be had of Perſons of known and good Reputation, which cauſed great Diſſatisfaction and a Stop to be put thereunto, until Their Majeſties Pleaſure ſhould be known therein.

And upon a Repreſentation thereof accordingly made, Her late Majeſty Queen *MARY* the Second, of bleſſed Memory, by Her Royal Letter given at Her Court at *Whitehall* the Fifteenth of *April* 1693. was Graciouſly Pleas'd to approve the Care and Circumſpection therein; and to Will and Require that in all proceedings againſt Perſons Accuſed for Witchcraft, or being Poſſeſſed by the Devil, the greateſt Moderation, and all due Circumſpection be Uſed, ſo far as the ſame may be without Impedyment to the ordinary Courſe of Juſtice.

And ſome of the Principal Accuſers and Witneſſes in thoſe dark and ſevere Proſecutions have ſince diſcovered themſelves to be Perſons of Profligate and Vicious Converſation.

Upon the Petition and Suit of ſeveral of the ſaid Perſons, and of the Children of others of them whoſe Parents were Executed.

Be it Declared and Enacted by His Excellency the Governour, Council and Repreſentatives, in General Court Aſſembled, and by the Authority of the ſame, That the ſeveral Convictions, Judgments and Attainders againſt the ſaid *George Burroughs*, *John Proctor*, *George Jacob*, *John Willard*, *Giles Core*, and *Martha Core*, *Rebecca Nurſe*, *Sarah Good*, *Elizabeth How*, *Mary Eaſtey*, *Sarah Wild*, *Abigail Hobbs*, *Samuel Wardell*, *Mary Parker*, *Martha Carrier*, *Abigail Falkner*, *Anne Foſter*, *Rebecca Eames*, *Mary Poſt*, *Mary Lacey*, *Mary Bradbury* and *Dorcas Hoar*, and every of them, Be and hereby are Reverſed, Made and Declared to be Null and Void to all Intents, Conſtructions and Purpoſes whatſoever, as if no ſuch Convictions, Judgments or Attainders had ever been had or given. And that no Penalties or Forfeitures of Goods or Chattels be by the ſaid Judgments and Attainders, or either of them had or incurr'd.

Any Law, Uſage or Cuſtom to the contrary notwithſtanding.

And that no Sheriff, Conſtable, Goaler, or other Officer ſhall be liable to any Proſecution in the Law for any thing they then Legally did in the Execution of their reſpective Offices.

BOSTON: Printed by *B. Green*, Printer to His Excellency the GOVERNOUR and COUNCIL. 1713.

"An Act, Made and Passed by the Great and General Court or Assembly of Her Majesty's Province of the Massachusetts-Bay in New-England, Held at Boston the 17th day of October, 1711."

The usual form would have been as follows: —

"An Act, passed by the Great and General Court or Assembly of Her Majesties Province of the *Massachusetts-Bay* in *New England:* Begun and Held at *Boston* upon *Wednesday* the Thirtieth Day of May, 1711. And continued by several Prorogations and Adjournments unto *Wednesday*, the Seventeenth of *October* following, and then met."

In the first the words "Made and" before "Passed" are not to be found in the caption of any contemporary publication of any other act, nor indeed in that of any publication of any other act or acts during the entire provincial period. I doubt whether it can be found in that of any copy of any act anywhere, excepting in the manuscript from which it was taken, to which I shall shortly refer again. The word "Majesty's" is correctly spelled, which had never been done before in the caption of any printed act of the Province of Massachusetts; for it was invariably spelled "Majesties" throughout the whole of the reign of Queen Anne, having been continued from the time of William and Mary and William III. without any alteration of this unmistakable tradition of Bartholomew Green's types until 1715, when the accession of George I. compelling the change of "Her" to "His" may have challenged the attention of the Secretary or the printer to the plural possessive. Even then it was not without difficulty that the new way finally triumphed. However this may have been, the fact is obvious that neither Mr. Secretary Addington nor Mr. Printer Green prepared the copy or read or revised the proof of the leaf before us. This is further shown by the remaining difference between the two captions, which is even more remarkable than those already mentioned. The regular official form invariably set forth the beginning of the Court, as well as its continuance, when the act or acts were of any other meeting or session than the first. In this case no notice is taken of either beginning or continuance of the Court, but the statement relates solely to the holding of what was in fact

the fifth session, with date of its beginning alone,—the session during which the act is alleged to have been passed.

I have already pointed out the fatal defects in the Salem manuscript which deprive it of authority as a sufficient record or copy of a record. A comparison of this printed paper with that manuscript will show that they are almost identical, and must stand or fall together. The manuscript furnished the text for the printer. No man can trace any other original.

Whoever procured the printing of this act, and whatever may have been the motive for it, it is apparent that either there was no application to the proper officer for an authorized copy of record, or if one was made, that it was unsuccessful. No legitimate beneficiary under such a law, wishing to publish it or avail himself of its provisions, would have failed to secure an exemplified copy; and the act itself, even if not technically a public act,[1] covered too many interests and would have commanded too wide an extent of public sympathy to have been forgotten. The inferences are obvious. There was no such law in the Secretary's office. The printing of this paper was surreptitious. The conclusion is irresistible. No such act became a law in 1711.

But there is a still more important argument to be noticed against the possible existence of this alleged law. It does not appear to have been known to anybody, even those who were most interested in the subject, until a comparatively recent period. Hutchinson, your great historian, evidently knew nothing whatever of the existence of any such law, although he was well acquainted with and mentions in his History[2] the "grants made for and in consideration of the losses sustained," etc., in the same year (1711), shown by the record preserved in the report of the Committee of Awards, with which we are now familiar.

The extracts printed in the Appendix to my Notes, etc., of proceedings in various years down to 1750, militate strongly against the genuineness of the act. I found no allusion to it in any of the petitions or legislative action thereon from the time when Philip English made his demand for redress in 1717 onward.

[1] If this act was a public act, my position is firmly sustained by the fact that it was not printed at the time with the other public acts of the same session.

[2] Vol. ii. p. 62, note.

In 1737, when the Rev. Israel Loring, pastor of a church in Sudbury, preached the Election Sermon, he revived the subject with great boldness and vigor, insisting on the duty of that generation in the matter: —

"Now," said he, "though the loss of Parents cannot be made up to their surviving Posterity, yet their Estates may; And *the Question is* (if it be not beyond all Question) *whether a Restitution is not due from the Publick to them*, and we are not bound in Justice to make it. *Hereby Infamy may be taken off from the Names and Memory of such as were Executed*, and who it may be did not in the least deserve it; *as well as a Reparation made* to *their* children for the injuries done *them;* who remain to this day among us in mean, low, and abject circumstances."

When the House of Representatives initiated proceedings in the next year (1738), following the direction indicated by Loring's strong advice, it does not appear that they knew anything about the act of 1711. If there ever was any such law of Massachusetts, the roll in parchment under the Province Seal must have been at that time in the Secretary's office, in the same building in which their session was held; but instead of calling for its production and having it laid on the table before them by the Secretary, that they might see for themselves "who was ye sufferers," they instituted a correspondence with the officials in charge of the Salem records. At the same time their doings indicate some knowledge of the previous grants of money, but not the slightest recollection of the formal legislation which we are now called upon to accept as complete and genuine.

Governor Belcher, in 1740, renewed the effort in an earnest speech, in which he declared to the legislature: "I really think there is something incumbent on this Government to be done, for *retrieving the Estates and Reputations of the Posterities* of the unhappy Families that so suffered," etc.

The stirring appeal of Parson Loring and the emphatic official statement of Governor Belcher alike bear testimony against this act. They could not have been uttered by men who knew of the existence of such a law. Yet Loring was born in 1682, and graduated at Harvard College in 1701, and probably was never out of Massachusetts for any considerable time to the day of his death in 1772. Belcher, born a

year earlier (1681) and graduating two years earlier (1699), although absent in Europe for several years after leaving college, returned long before the agitation of the subject in the legislature, which is said to have resulted in the final enactment of the statute in question. Both were contemporaries, and could not have failed to be interested contemporaries, of the men and events of the witchcraft period itself and the following half-century. Their childhood was shadowed by the immediate traditions of the Devil and his works in Salem, and their manhood was haunted by the recollection of the sorrow and sufferings of the victims and their families. No man lived in Massachusetts from 1692 to 1750 who could have forgotten such a vindication of the witches, if it had ever been consummated.

That they did not forget is plainly shown by the language which I have quoted, and the fashion in which, after so many years of neglect and indifference, they demanded justice for the representatives of the victims of that infernal delusion, — that infamy might be taken off the names and memory of such as were executed, — that their reputations as well as their estates might be retrieved.

In the legislatures to which these appeals were addressed there were many, doubtless, who were old enough themselves to recall the thrilling incidents of the witchcraft period, and those assemblies were full of men familiar from personal knowledge or household traditions with everything which had been done, and especially much that had been proposed but not done, — a neglect which some of them evidently sought to amend. It is plain that these men did not think what had been done was sufficient, or that the aggregate of the appropriations of 1711 was an adequate compensation to the representatives of those who had suffered. They were not satisfied with what had been done. Doubtless there were great differences of opinion among the people. There must have been a powerful party in the legislature determined against further action. The struggle continued at intervals till the middle of the century, when, in 1750, the last recorded effort failed even to secure the attention of the committee to which it was referred. Mr. Goodell says of this committee: "It is not too harsh to say that it was their duty, in 1750, to report against reconsidering a claim which had been fairly settled, and the

reopening of which would have furnished a precedent for a general and formidable assault upon the Province treasury." But they do not appear to have made any such report or any other report, or even to have met for consideration of the matter. Although they were reminded of their duty by a resolution of the House of Representatives, months after their appointment, "directing them to sit forthwith, consider the petition to them committed, and report as soon as may be," I have not been able to learn that they did either sit, consider, or report, so that my friend's justification of their report may, without offence, be considered as superfluous.

The existence, then, of the alleged statute of 1711 remains to be proved. It is unnecessary to waste time in fruitless speculations about probabilities, or conjectures about things hidden or not revealed. "*De non apparentibus et non existentibus, eadem est ratio.*" Until some authority can be made to appear for the fact of completion of that law by due consent of the Governor, impress of the Province Seal, and formal publication, it cannot properly be said to have existed at any time as a law, and its counterfeit presentment must be relegated to the *limbo* of imperfect legislation, or that historical house of correction which, we are told, is paved with good intentions.

Let the cabinet in which its remains may be preserved bear the inscription, *Tantum non lex — requiescat.*

It remains for you, Gentlemen, who are surrounded by the materials out of which must come the final determination of this and all other doubtful questions in the history of Massachusetts, to stretch forth your hands and set them fitly in order, with authority that all shall recognize and none may gainsay; so that we whose dwellings are remote from these sacred and perennial fountains, may come up from time to time out of the lands of the Gentiles, by the coasts beyond Jordan, slake our thirst without doubt or misgiving, and go our way rejoicing.